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No. 543

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

E. J. DIMOCK,
Counsel for Petitioners.

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We respectfully refer the Court to the brief attached to the petition in *The City of Yonkers* against *Walter F. Downey* (filed contemporaneously herewith).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Joseph F. Loehr, *et al*, petitioners above named, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on August 22, 1939.

Opinion Below.

The opinion of the United States District Court for the Southern District of New York is not reported (R. 140-141). The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 106 F. 2d 69 (R. 171-181).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 22, 1939 (R. 182). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Presented.

The questions presented by this petition are two:

1. Whether the effect of an *ultra vires* pledge made by a national bank in New York to secure a deposit is determined (a) by the rule in the federal courts that the bank need not repay the deposit in order to obtain the return of the pledged securities or (b) by the rule in the New York courts that the bank must repay the deposit in order to obtain this return.

2. Whether payments made by a bank to a depositor in accordance with the Presidential Proclamation after the banking holiday of March 6, 1933, but before the bank was taken over by the Comptroller of the Currency, can be recovered as preferential without any proof that the payments were made after the commission of an act of insolvency or in contemplation of insolvency, or proof that the payments were made with the intent of creating a preference.

Statutes and Proclamations Involved.

The statutes and proclamations involved are set out in the Appendix to the petition and brief submitted contemporaneously herewith in the companion action of *The City of Yonkers, against Walter F. Downey, Receiver.*

Companion Actions.

At about the time this action was instituted in the District Court, the Receiver instituted similar actions against The City of Yonkers, the Trustees of the Firemen's Pension Fund of the City of Yonkers, and The City of Yonkers, as Trustee of the "Saunders Trade School Fund". All four of the actions were tried separately, but in immediate succession. Appeals to the United States Circuit Court of Appeals for the Second Circuit were taken in all four actions simultaneously, and the appeals argued at the same time, the Court handing down one opinion bearing the caption of all four actions (R. 171). Petitions to this Court for a writ of certiorari are being made simultaneously in each of the four actions, the other three petitions being entitled:

"*The City of Yonkers, Petitioner* against *Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation*", October Term, 1939, No. 542,

"*Joseph F. Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, Petitioners,* against *Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,*" October Term, 1939, No. 544, and

"*The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of 'The Saunders Trade*

School Fund', Petitioner, against *Walter F. Downey, as Receiver of The First National Bank and Trust Company of Yonkers, New York",* October Term, 1939, No. 545 .

Statement.

On July 10, 1929, the Board of Estimate and Apportionment of The City of Yonkers adopted a resolution designating certain banks as depositaries for all moneys of the City, and directing the City Treasurer to procure adequate security for all moneys deposited by him in such banks, securing the City of Yonkers against any loss of the moneys deposited and prescribing rates of interest on the general accounts which must be received (R. 96). On September 30, 1929, The First National Bank and Trust Company of Yonkers was formed by merger of three of the depositaries named in the Resolution (R. 67, 104, 105).

On June 25, 1930, the so-called National Bank Enabling Amendment (12 U. S. C. 90, 46 Stat. 809) took effect. It provided:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State, in which such association is located in the case of other banking institutions in the State."

The banking practice and the accepted view of the law as to such pledges at the time of the passage of the Enabling Amendment and thereafter appear in the following quotation from the opinion of this Court written by Mr. Justice Black in *McNair* v. *Knott*, 302 U. S. 369, 371 (1937):

> "For many years Comptrollers of the Currency assumed that National banks had power to give security for public deposits and approved the prac-

tice of the banks in pledging such security. It has been, and is now, the policy of most states to require security for public funds whether deposited in State or National banks. The weight of judicial authority in the state courts has supported the doctrine that banks could pledge security for public deposits, but not for private deposits."

On February 28, 1933, the Court of Appeals of the State of New York handed down an opinion in *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, which held that a pledge by a state bank to secure a deposit was *ultra vires* but that the assets pledged could not be recovered without repaying the deposit.

On March 4, 1933, petitioners had on deposit in the Bank funds in the sum of $29,233.67, in an account entitled "Police Pension Fund, City of Yonkers", (R. 119), and in the sum of $50, in an account entitled "City of Yonkers, Police Pension Fund" (R. 119). On that day, The City of Yonkers held bonds having a par value of $535,000 which had been pledged with it in accordance with the Resolution, as security for the deposits in the above accounts, as well as for the deposits in the accounts involved in the three companion actions (R. 118).

The Governor of the State of New York proclaimed Saturday, March 4th, and Monday, March 6th, banking holidays (R. 88), and on March 6th, the President and the Governor declared a banking holiday to and including Thursday, March 9th (R. 90). During this period and up to March 20, 1933, The First National Bank and Trust Company was under the management and control of its own officers, but under restrictions imposed upon it and all other banks (R. 35). While the Bank was under the control of its officers and before the appointment of a Conservator, pension checks issued by petitioners, aggregating $566.67, were honored and paid out of the larger account by the Bank (R. 166).

On March 20, 1933, the Comptroller of the Currency appointed a Conservator of the Bank. Between March 20, 1933, and March 28, 1933, payroll checks issued by the petitioners aggregating $520.83 were honored and paid out of the larger account (R. 121).

On March 28, 1933, the Conservator and petitioners agreed that the bank would repay the deposits to petitioners if they would surrender the pledged assets. By various withdrawals of deposits from the accounts aggregating $28,196.17, and surrenders of securities of a par value of $534,000, this agreement was carried out, making a total of $29,283.67 of deposits withdrawn from the accounts (R. 121-124, inc.).

On February 5, 1934, after all of these withdrawals and surrenders, the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, held that a pledge by a national bank to secure a deposit was *ultra vires* and that the receiver of the bank could recover the pledged assets without paying back the deposits.

Thereafter this action and the three companion actions were brought by a Receiver who had succeeded the Conservator of the First National Bank and Trust Company of Yonkers (R. 87) to recover the deposits which the Bank had paid out on pension checks and the deposits which the Conservator had paid out in exchange for the pledged assets in so far as such deposits exceeded the 50% dividend to which petitioners would have been entitled as unsecured depositors.

The cases were tried before a Judge in the United States District Court for the Southern District of New York, a jury having been waived by stipulation on the record (R. 29).

If the law as laid down by the New York State courts governed the consequences of the pledge either by its own force or by adoption by the federal statute, the repayment of the deposits and the return of the pledged securities was

in strict accordance with the rights of the parties so that the plaintiff could not succeed.

If, however, the law as stated in the federal courts were applicable to the consequences of the pledge, the Conservator had overpaid petitioners when he paid out the deposits in full and recovered the pledged securities.

Even if the repayment of the deposits had not been justified by the existence of the pledge, the Receiver could not recover without proof that the payments by the Bank were made after the commission of an act of insolvency, or in contemplation of insolvency, or proof that the payments were made with the intent to prefer petitioners over other creditors.

The District Court (R. 137) refused to find as Conclusions of Law that if the pledge was *ultra vires* the rights and obligations of the parties were determined by the laws of the State of New York (No. 33, R. 131) and that in order to recover the pledged assets it was necessary to repay the deposits in full (No. 34, R. 131), and that under the law of the State of New York state banks were "authorized" to give security in the case of public deposits (No. 28, R. 130).

The District Court found as a Conclusion of Law (No. 4, R. 127) that the Proclamation of March 6, 1933, did not create a presumption that the Bank was insolvent, but the court nevertheless found as a fact (No. 20, R. 107) that it was insolvent on that day.

Judgment was entered for $14,641.84, representing fifty per cent. of the moneys withdrawn after March 4, 1933, plus interest thereon from May, 1936, in the sum of $2,255.73, or a total of $16,970.42, including costs (R. 143).

Petitioners excepted (R. 138) and assigned error on appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 158, 159, 150). The latter affirmed the judgment of the District Court (R. 182).

Petitioners argued in the Circuit Court of Appeals that the New York State common law controlled the consequences of the pledge under *Erie R. R. Co.* v. *Tompkins*,

304 U. S. 64 (1938), because the National Bank Act (unless it incorporated the state law by reference) made no provision as to the effect of an *ultra vires* pledge of assets to secure a deposit, and, as held in *National Bank* v. *Commonwealth*, 9 Wall. 353 (1869), there was no federal common law of national banking.

The Circuit Court of Appeals denied the validity of one of the necessary steps in that argument by holding that the National Bank Act did in effect make provision as to the consequences of an *ultra vires* pledge of assets to secure a deposit. It held (R. 178) that the matter was one of national concern and that the New York rule was directly in the face of the National Bank Act. It also held that the Enabling Amendment of the National Bank Act did not incorporate the New York state law by reference because a pledge, which only existed because of the power of a New York state bank to accept the liabilities and rights thrust upon it as a consequence of the attempted exercise of a disapproved power, could not be said to be "authorized" (R. 176).

On the second point in the case, petitioners' claim that, because of the absence of proof of the commission of any act of insolvency or contemplation of insolvency or intent to prefer them over other creditors, the receiver could in no event recover the payments made before the Comptroller of the Currency took over the bank, the Circuit Court of Appeals held that the fact that the bank never opened for business between the day of the Presidential Proclamation and its final receivership and that no attempt was made by petitioners to show any change in its condition after that date were sufficient to indicate insolvency at the time of the Proclamation (R. 180).

Specification of Errors to Be Urged.

The court below erred in holding:

1. That the question of the consequences of the *ultra vires* pledge was governed by the decisions of the federal courts rather than the New York courts.

2. That the consequences of the *ultra vires* pledge were fixed by the policy of the National Bank Act.

3. That the so-called Enabling Amendment of the National Bank Act did not adopt the decisions of the New York courts as fixing the consequences of the *ultra vires* pledge.

4. That the mere closing of the bank in the universal banking holiday under the Presidential proclamations, coupled with the taking over of the bank by the Comptroller prior to the close of the banking holiday, is evidence that the bank committed an act of insolvency, or contemplated insolvency or intended to prefer petitioners over other creditors, prior to the date that the Comptroller took over the bank, within the meaning of §91 (12 U. S. C.).

A word should be said with respect to the holding by the Circuit Court of Appeals (R. 181) that the payments made by the Conservator (as distinguished from those made by the Bank) could be recovered because made by a public official under a mistake of law. This ground for recovery does not exist unless there is a mistake of law, and if, as petitioners contended, the New York law applied, the payments instead of being made under a mistake of law were made in strict accordance with law.

Reasons for Granting the Writ.

The writ of *certiorari* should be allowed because:

I. (a) The judgment of the Circuit Court of Appeals in holding that the policy of the National Bank Act fixed the

consequences of an *ultra vires* pledge, decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States, and decided it in a way which is probably in conflict with the decisions of this Court that state laws operate "upon the dealings and contracts of national banks" except where "they expressly conflict with the laws of the United States of frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States" (*McClellan* v. *Chipman*, 164 U. S. 347, 357 (1896); see also *National Bank* v. *Commonwealth*, 9 Wall. 353, 362, *supra*; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275 (1896));

(b) Even if the Circuit Court of Appeals were right in holding that the power to accept the consequences of an *ultra vires* act was a matter of the statutory authority of national banks under the National Bank Act, the judgment of that court in holding that no *ultra vires* power, even though effective under state law, could be said to be "authorized" within the meaning of that term as used by the Enabling Amendment to the National Bank Act, decided an important question of federal law which has not been, but should be, settled by this Court;

(c) The failure of the Circuit Court of Appeals to decide one of these two questions in favor of the application of the state law has resulted in a situation where the City of Mount Vernon has obtained security for its deposits from a state bank and been permitted by the New York Court of Appeals to recover its deposits in full upon insolvency (*City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400 (1936)); while the neighboring City of Yonkers in a precisely similar relationship to a national bank, has been held in this case to be a general creditor only, all in conflict with the traditional desire of Congress to enable the national banks to compete upon a footing of equality with the state banks (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S.

559, 564 (1934). We know of two other municipalities in the State of New York which obtained pledges from national banks to secure their deposits, and their cases and probably those of many others depend upon the decision in the case at bar.

II. a. The determination of the Circuit Court of Appeals in affirming so much of the judgment of the District Court as allowed the receiver to recover 50% of deposits paid prior to the time the Comptroller took over the Bank is opposed to and in conflict with

(1) The determination of this Court that to recover payments as preferential under § 91 (12 U. S. C.), a finding of insolvency is insufficient in the absence of proof that the payments were made after an act of insolvency or in contemplation thereof with a view to prefer one creditor to another. *McDonald* v. *Chemical National Bank*, 174 U. S. 610 (1899); *Earle* v. *Carson*, 188 U. S. 42 (1903);

(2) The determination of the Circuit Courts of Appeals for the Fifth and Third Circuits that the closing of the bank pursuant to the Presidential Proclamation declaring a banking holiday is not an act of insolvency under which payments made thereafter are preferential. *Kullman & Co.* v. *Woolley*, 83 F. 2d 129 (5th, 1936); *Richman* v. *First Methodist Episcopal Church*, 76 F. 2d 344 (3rd, 1935);

(3) The determination of the Circuit Court of Appeals for the Third Circuit that the burden of proving that a transaction is in violation of § 91 is upon the receiver. *Collins* v. *School District of Borough of Trafford*, 72 F. 2d, 339, (1934);

b. The District Courts and Circuit Courts throughout the country are not in accord as to whether claims against a national bank in liquidation after the banking holiday of 1933 should be resolved as of the date of the Presidential Proclamation or as of the date on which the Comptroller

of the Currency took over the Bank through a Conservator. A final determination as to which of these dates controls should be made by this Court to establish uniformity in the decisions in the courts throughout the country.

Bryce v. *National City Bank of New Rochelle*, 93 F. 2d 300 (C. C. A. 2nd, 1937);
Richman v. *First Methodist Episcopal Church*, 76 F. 2d 344 (C. C. A. 3rd, *supra*); cert. den. 296 U. S. 593;
Schram v. *Clair*, 28 F. Supp. 422 (E. D. N. Y., 1939);
Ward v. *Simon*, 23 F. Supp. 117 (E. D. Pa. 1938);
Pyne v. *Jackman*, 12 F. Supp. 653 (S. D. N. Y., 1934);
Aufderheide v. *Mine Safety Appliance Co.*, (W. D. Pa., 1934);
Sadlier v. *Lay*, 222 Wisc. 64; 269 N. W. 555 (Sup. Ct. 1936);
Goess v. *Myers*, 134 Pa. Super. 272; 4 A. 2d 184 (Sup. Ct. Pa., 1939);
Willing v. *Argosy Building & Loan Assn.*; 19 F. Supp. 353, (E. D. Pa., 1937);
Hardee v. *Washington Loan & Trust Co.*, 91 F. 2d 314 (C. A. D. C., 1937);
Dehne v. *Mine Safety Appliance Company*, 94 F. 2d 956 (C. C. A. 3rd, 1938);
Willing v. *Eveloff*, 94 F. 2d 344 (C. C. A. 3rd, 1938); cert. denied 305 U. S. 611.

SUPPORTING BRIEF.

A petition for certiorari in the companion case of *The City of Yonkers* v. *Walter F. Downey*, No. 542, is being submitted to this Court contemporaneously with this petition. There is attached to the petition in the companion case a brief containing the argument of the petitioner therein in

support of its reasons for granting the writ. Since the reasons and the argument in support thereof in this case are identical to those in the companion case, and since the facts in the two cases are the same except that the amounts of the deposits and withdrawals are smaller, we respectfully refer the Court to the brief attached to the petition in *The City of Yonkers* v. *Walter F. Downey,* for the argument in support of the reasons for granting this petition.

Conclusion.

The petition for review on Writ of Certiorari should be granted.

Respectfully submitted,

E. J. Dimock,
Counsel for Petitioners.

November 18, 1939.